

Indiana State Board of Accounts: Circuit Court Clerk's Conference

*Presented by:
The Office of the Public Access Counselor
June 4, 2013*

The Indiana Open Door Law (ODL)

"...It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed..." IC 5-14-1.5-1.



Meetings under the ODL

General Rule of Thumb: Meetings covered by the ODL are to be open to the public.

Exception to the Rule: Executive Sessions

- Not all meetings are covered by the ODL
- Governing body of public agency
- Majority must be present
- Some gatherings are excluded from ODL
- Taking official action on public business
- Includes committees/panels appointed by governing body or its presiding officer

Meetings under the ODL

- No right to speak under ODL unless some other statute requires it (i.e. public hearings)
- Do have right to attend and observe meetings
- Meetings may be taped or recorded but governing body may regulate placement of cameras, microphones etc.

Minutes and Memoranda

ODL requires Governing Bodies to keep certain memoranda:

Date, time and place

Members present or absent

General substance of matters discussed/decided

Record of all votes, by individual if a roll call vote

*Agendas, if used, must be posted prior to meeting

*Minutes, if any, must be made available for public inspection

What Kind of Notice is Required

- 48 business hours in advance
- Date, time and place where Governing Body will meet
- Generally, no requirements to publish in newspaper
- Annual notices are permitted
- Emergency meetings are exception to 48 hour notice requirement
- Must post at principal place of business or meeting location
- 2012 legislation concerning local public agencies allows the adoption of policies to provide additional notice (website, e-mail, annual notices for non-media requestors)
- Special meetings of County Executives IC 36-2-2-8

Public Notice

Notice of Public Meeting:
Xavier Town Council
Wednesday, November 16, 2011
5:30 p.m.
City Hall, Room 104

123 Main Street, Xavier, Indiana

7

Executive Sessions-I.C. 5-14-1.5-6.1

- The “exception” to meetings that are open to the public
- Notice must include statutory purpose(s) for the meeting excluding the public.
- Meeting minutes or memoranda must include certification that only the topics permitted under the ODL for executive session were discussed.
- NO FINAL ACTION (e.g. voting)

Executive Session Exceptions under the ODL

- To discuss records classified as confidential by state or federal statute
- To discuss the alleged misconduct of an employee
- To receive information and interview prospective employees
- To discuss strategy with respect to pending litigation or litigation threatened in writing
- To discuss information and intelligence intended to prevent, mitigate or response to threat of terrorism

Executive Session Public Notice

Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

The Council will meet to discuss a job performance of an individual employee as authorized under

I.C. 5-14-1.5-6.1(b)(9)

Improper Executive Session Notice

Notice of Executive Session

Xavier Town Council Executive Session

Wednesday, November 16, 2011

5:00 p.m.

City Hall, Room 104

123 Main Street Xavier, Indiana

Personnel and Litigation to be discussed

11

Remedies

Public
Access
Counselor

Informal or
formal opinion

Useful should
you file suit
under the ODL

File a
Lawsuit
Under the
ODL

If successful,
could recoup
attorneys fees
and court costs

Access to Public Records Act (APRA)



- Indiana Code § 5-14-3-1 through 5-14-3-10
- Enacted in 1983 ("APRA")

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master.

Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.

This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record."

What is a public record

See Indiana Code § 5-14-3-2(m) for the definition of "public agency" in APRA.

"Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code § 5-14-3-2(n)

Responding to APRA Requests

Time frames for responding to APRA Requests depends on the manner in which the public agency receives the request.



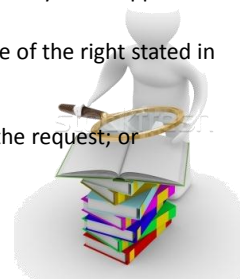
IC 5-14-3-9 concerns denial and remedies, but also sets forth times for response:

- If requestors is **physically present** in the office of the agency, makes the request by **telephone**, or requests **enhanced access** to a document and, the agency has twenty-four (24) hours to respond.
- **(enhanced access=on disk or through remote computer)**
- If the request is made by **mail or by facsimile** the public agency has 7 days from the date the public agency received the request to respond.
- Important: Production of documents is not required in these time frames, but within a reasonable time.

Right to Inspect and Copy Public Records

IC §5-14-3-3, in relevant part, sets forth general rule of APRA:

- Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, **except as provided in section 4 of this chapter.**
- A request for inspection or copying must:
 - (1) identify with reasonable particularity the record being requested; and
 - (2) be, at the discretion of the agency, in writing on or in a form provided by the agency.
- No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute.
- A public agency may not deny or interfere with the exercise of the right stated in subsection (a).
- The public agency shall either:
 - (1) provide the requested copies to the person making the request; or
 - (2) allow the person to make copies:
 - (A) on the agency's equipment; or
 - (B) on the person's own equipment.



Three Categories of Public Records



Disclosable



Confidential



Disclosable at the discretion
of the public agency

Exceptions to disclosure

- Confidential Public Records-IC 5-14-3-4(b)
- Categories of public records that are confidential and cannot be disclosed *unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery*

Confidential Public Records



Those confidential by state statute or federal law (i.e. IC 4-6-9-4)



Social Security Numbers contained in public records



Patient medical records unless the patient gives written consent



Trade secret information



Certain foreclosure information



Grade transcripts/license exam scores in licensure process

Exceptions to disclosure



Discretionarily disclosable public records

IC 5-1-3-4(b)

Public agencies must exercise this discretion uniformly, subject to review under an arbitrary and capricious standard.

Public agencies may exercise their discretion as to certain categories of public records to withhold them from disclosure.

Discretionary Categories-I.C. 5-14-3-4(b)

- Investigatory records of law enforcement agencies
- The work product of an attorney representing, pursuant to state employment or an appointment by a public agency, a public agency, the state or an individual.
- Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.
- Personnel files of public employees and files of applicants for public employment, however certain information must be provided upon request including compensation, business telephone number, dates of first and last employment, etc

Other Items of Note under APRA



Copying Fees

Enhanced access/AccessIndiana



If a public record contains nondisclosable and disclosable information, APRA requires the public agency to redact/separate the nondisclosable information.

Access to Public Records Act

Electronic Mail

- A public record is any record, including electronic media, that is created received, retained, maintained, or filed by or with a public agency.
- Electronic mail must be available for inspection and copying by the governing body unless an exception to disclosure, based on the content of the email, applies.
- Electronic mail must be maintained in accordance with records retention schedules, pursuant to I.C. 5-15.
 - Most agencies have their own retention schedules.

23



Common Misconceptions of Requestors

- A public agency has to answer my questions under APRA.
- A public agency has to keep public records forever so it is not appropriate to respond that the record no longer exists.
- A public agency must handle public records requests before handling other matters of the public agency.
- A public agency must keep public records in a format that is most convenient for me.

Other common misconceptions

- Offering to allow inspection is always sufficient. **See 11-FC-238**
- All disclosable records requested must be produced within 7 days of receiving the request. **See 11-FC-74**
- Denials do not have to be explained with specificity.
- All documents containing medical information, children's names or personal information are confidential.
- Any document containing confidential information may be omitted from public records response. **See 10-FC-7**

Remedies and penalties for noncompliance



- Complaint to Public Access Counselor
- Bad press and damage to public perception
- Court action seeking order to produce records and potentially order to pay attorney's fees
- Fines for knowing and intentional withholding of public records

Thank you for your participation

Contact Information:

Indiana Public Access Counselor

402 W. Washington St, W470

Indianapolis, IN 46204

317.234.0906

pac@icpr.in.gov

Access to Public Records Act:

<http://www.in.gov/legislative/ic/code/title5/ar14/ch3.html>

Public Access Handbook:

http://www.in.gov/pac/files/pac_handbook.pdf

Public Access Counselor Website:

<http://www.in.gov/pac/>